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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re the Marriage of DUANE and SHEILA PROKUSKI.	
DUANE PROKUSKI, Appellant, v. SHEILA PROKUSKI, Respondent.	F065903 (Super. Ct. No. FL-583813) **OPINION**

THE COURT[*]

APPEAL from order of the Superior Court of Kern County. Stephen D. Schuett, Judge.

McGrath Cloud Law and Bobby L. Cloud for Appellant.

Law Offices of Michael R. Kilpatrick and Michael R. Kilpatrick for Respondent.

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[*] Before Levy, Acting P.J., Detjen, J. and Peña, J.

Appellant Duane Prokuski moved to set aside prior judgments and orders in his dissolution of marriage action that required an equalization payment of $218,000 and spousal support of $1,000 per month. The grounds he raised were fraud, perjury and failure to disclose. The superior court denied Duane's motion and he filed this appeal.

In presenting his challenges to the trial court's order, Duane has failed to abide by the basic rules of appellate procedure that (1) the evidence must be viewed in the light most favorable to the prevailing party and (2) appellants have the burden of affirmatively demonstrating prejudicial error. In this appeal, Duane has not carried his burden.

We therefore affirm the order denying the motion to set aside.

FACTS AND PROCEEDINGS

Duane Prokuski and Sheila Prokuski were married on May 20, 1969, and separated in June 2002. In September 2002, Duane filed a petition for dissolution of marriage.

A five-day trial was conducted in March and April of 2004. On July 21, 2004, the superior court issued a minute order that set forth its ruling on the matters submitted, including spousal support. On October 21, 2004, the court filed a judgment of dissolution terminating marital status and a lengthy opinion that restated the findings in the July minute order. The ruling and judgment divided the real and personal property in dispute and directed Duane to pay Sheila spousal support in the amount of $1,000 per month.

Duane appealed the superior court's characterization and valuation of certain assets. On June 13, 2006, this court filed a nonpublished opinion in *In re Marriage of Prokuski*, case No. F047224, affirming the superior court's October 2004 judgment.

On August 23, 2006, remittitur was filed with the superior court and the October 2004 judgment became final. The spousal support ordered in that judgment is being challenged by Duane in this proceeding.

In January 2008, the parties entered a stipulation regarding outstanding monies owed to Sheila by Duane, which was entered as a minute order. Pursuant to the stipulation and order, Duane was required to pay Sheila the sum of $218,000 by April 10, 2008, in full satisfaction of the property equalization payment awarded Sheila in the judgment. Subsequently, the parties entered another stipulation, which became part of the superior court's order of April 21, 2008. Under that stipulation and order, Sheila was to be paid $218,000 through escrow no later than April 30, 2008. The equalization payment is being challenged by Duane in this proceeding.

In 2009, Duane filed an order to show cause regarding modification of the spousal support payments. In response to the order to show cause, Sheila filed a declaration of income and expenses dated April 1, 2009, using mandatory Judicial Council form FL-150 (rev. Jan. 1, 2007). The declaration asserted that Sheila had no salary or wages and that she received one-time payments during the prior 12 months of $218,000 from Duane and $39,000 as an inheritance from her mother.

In April 2009, the superior court held a hearing on Duane's order to show cause regarding modification of spousal support.

On May 26, 2009, the trial court issued a ruling upholding previous spousal support orders, finding that Duane had not established a material change in circumstances since the most recent support order was made. This ruling regarding spousal support is being challenged by Duane in this proceeding.

The issues raised in this appeal were brought before the trial court by Duane's April 23, 2012, motion to set aside the previous judgments in their entirety or, alternatively, as to the portions addressing spousal support and the equalization payment. The motion asserted that Sheila committed fraud, perjury or a violation of her fiduciary duty to disclose her cohabitation with Randy Newingham, a fact material to her need for spousal support.

Duane supported his motion with a written statement from Newingham and transcripts of Sheila's depositions and courtroom testimony. These documents were submitted to the superior court as exhibits on June 12, 2012, the day of the hearing on Duane's motion to set aside. At that hearing, the superior court stated that its decision on Duane's motion to set aside would be continued to the hearing on June 21, 2012, so that it could look at the transcripts submitted.

At the June 21, 2012, hearing, the first issue addressed by the superior court was Duane's motion to set aside. The court stated its reasons for denying the motion. The same day, the court filed a minute order stating that Duane's motion was denied. The appellate record does not show whether Duane made a timely request for a statement of decision.

In September 2012, Duane filed a notice of appeal from the June 21, 2012, order that denied his motion to set aside.

DISCUSSION

I. BACKGROUND REGARDING MOTIONS TO SET ASIDE JUDGMENTS

In 1993, the Legislature undertook to clarify and rationalize the law governing the relief that could be obtained from judgments entered in family law matters by enacting Family Code sections 2120 through 2129, also known as the "Relief from Judgment" chapter.[1] (*In re Marriage of Heggie* (2002) 99 Cal.App.4th 28, 32.) These are the statutory provisions that apply to the motion underlying this appeal.

Section 2121, subdivision (a) provides that, in a proceeding for dissolution of marriage, "the court may, on any terms that may be just, relieve a spouse from a judgment, or any part or parts thereof, adjudicating support or division of property, after the six-month time limit of Section 473 of the Code of Civil Procedure has run, based on

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[1] Unless stated otherwise, all further statutory references are to the Family Code.

the grounds, and within the time limits, provided in this chapter." Therefore, a litigant pursuing a motion to set aside may obtain relief only if the litigant timely raises a statutory ground for relief *and* satisfies the two conditions set forth in subdivision (b) of section 2121:

> "In all proceedings under this chapter, before granting relief, the court shall find that the facts alleged as the grounds for relief materially affected the original outcome *and* that the moving party would materially benefit from the granting of the relief."[2] (Italics added.)

The grounds for a motion to set aside a judgment are listed in subdivisions (a) through (f) of section 2122 as actual fraud, perjury, duress, mental incapacity, mistake, and the failure to comply with statutory disclosure obligations. Section 2122 also specifies time limits in which to raise each ground (those time limits are not relevant to this appeal).

When a litigant files a motion under the Relief from Judgment chapter and "a timely request is made, the court shall render a statement of decision where the court has resolved controverted factual evidence." (§ 2127; cf. Code Civ. Proc., § 632 [statement of decision after court trial].)

II. STANDARD OF REVIEW

A. General Principles Regarding Abuse of Discretion

Section 2121, subdivision (a) provides that a superior "court may, on any terms that may be just, relieve a spouse from a judgment" adjudicating support or the division of property, subject to the time limits and grounds set forth in the statute. The statutory phrase "may, on any terms that may be just" grants discretionary authority to the superior court. As a result, appellate courts review a superior court's refusal to set aside a

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[2] Whether Duane satisfied these two conditions is an issue presented in this appeal.

judgment under an abuse of discretion standard. (*In re Marriage of Varner* (1997) 55 Cal.App.4th 128, 138.)

The abuse of discretion standard calls for varying levels of deference depending on the aspect of the trial court's ruling under review. (*In re Marriage of Walker* (2012) 203 Cal.App.4th 137, 146.) The superior court's findings of fact will be upheld if supported by substantial evidence. (*Ibid*.) The superior court's resolutions of questions of law are subject to independent (i.e., de novo) review. (*Ibid*.) Where the rules of law applicable to the facts of the case grant the superior court a range of discretionary options, the appellate court will uphold the superior court's action so long as it falls within that discretionary range. (See *Department of Parks & Recreation v. State Personnel Bd.* (1991) 233 Cal.App.3d 813, 831 [an "abuse of discretion standard … measures whether, given the established evidence, the act of the lower tribunal falls within the permissible range of options set by the legal criteria"].)

B. Doctrine of Implied Findings

In this case, Duane did not make a timely request for a statement of decision or assert there were any omissions or ambiguities in the superior court's oral statement of the reasons for its denial of the motion to set aside. Therefore, we are bound by the doctrine of implied findings. (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133-1134; Hogoboom & King, Cal. Practice Guide: Family Law (The Rutter Group 2013) ¶¶ 15:101-15:102 & 15:116, pp. 15-22 to 15-23 & 15-26.) Under this doctrine, an appellate court must presume the trial court made implied findings of fact that are favorable to the judgment. (*In re Marriage of Arceneaux, supra,* at p. 1134.) This doctrine is derived from the general principle of appellate law that the appealed judgment or order is presumed correct and all intendments and presumptions are indulged to support it on matters as to which the record is silent. (See *Denham v. Superior Court* (1970) 2 Cal.3d 557, 564; *Fladeboe v. American Isuzu Motors Inc.* (2007) 150 Cal.App.4th 42, 58

[doctrine of implied findings is a logical corollary of fundamental principles of appellate review].)

The doctrine of implied findings is limited by the principle that a finding favorable to the judgment can be inferred only if it is supported by substantial evidence. (E.g., *People ex rel. Dept. of Corporations v. SpeeDee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135, 1143 [under abuse of discretion standard of review, appellate court must accept trial court's implied findings of fact supported by substantial evidence]; *Smith v. Adventist Health System/West* (2010) 182 Cal.App.4th 729, 745 [implied finding inferred by appellate court only if supported by substantial evidence].)

We have set forth the doctrine of implied findings because the version of facts presented in Duane's appellate briefing does not comply with the doctrine or the substantial evidence standard of review,[3] which provides that the appellate court must view the evidence in the light most favorable to the prevailing party—that is, we must give the prevailing party the benefit of every reasonable inference and must resolve all evidentiary conflicts in favor of the prevailing party. (*Jessup Farms v. Baldwin* (1983) 33 Cal.3d 639, 660.)

III. DUANE'S CLAIMS OF REVERSIBLE ERROR

Duane's motion to set aside presented a number of options for relief. Duane's first choice was to have all of the July 21, 2004, ruling and related October 2004 judgment set aside. As an alternative, he requested that the part of the ruling and related judgment concerning spousal support be set aside. If the court did not grant that relief, Duane

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3 One example of Duane's failure to describe the facts of this case in accordance with these long-standing rules of appellate practice involves the starting and ending dates of Sheila's cohabiting with Randy Newingham. Viewing the evidence in the light most favorable to himself, Duane states that the cohabitation occurred from March 2003 through December 2008. In contrast, viewing the conflicting evidence in the light most favorable to Sheila leads to the conclusion that the cohabitation (in contrast to the relationship itself) began in 2006 and ended in October 2008.

requested it to set aside all or part of the April 2008, ruling that required him to pay Sheila $218,000. Failing that, Duane requested the court to set aside all or part of the judgment based on the May 26, 2009, ruling.

The superior court denied the motion. On appeal, Duane asserts the superior court committed a number of reversible errors.

A. Newingham's Notarized Written Statement

Duane contends that the written statement of Randy Newingham, which sets forth information about his cohabitation with Sheila, should have been admitted and considered. The written statement bears Newingham's signature and the seal of a notary public from the State of Illinois that indicates the statement was "[s]ubscribed and sworn before me this day of January 27, 2010." The statement addresses the topic of the cohabitation of Newingham and Sheila as follows:

> "I, Randy Newingham met Sheila Prokuski on March 23, 2003. From March 29, 2003 until the end of April 2003, Sheila and I lived together in hotels and motels. Sheila and I then moved to St. Louis Missouri where we lived in my camper until the end of May 2005. During this period all of the living expenses and personal bills were paid by me with no contribution from Sheila. The amount of Sheila's share of these expenses is approximately $20,000."

The remainder of the written statement addresses matters involving a boat named "America," such as the funding of its purchase and the expenditure of labor and funds on its restoration.

Duane's opening appellate brief states that (1) "it appears" that the superior court excluded Newingham's written statement, (2) the court gave no reason for the exclusion, and (3) Duane "surmises that is was excluded under the hearsay rule."

We reject Duane's position that the superior court excluded and did not consider Newingham's written statement. Our conclusion is based on our interpretation of the contents of the reporter's transcript for the hearings held on June 12 and 21, 2012 — an interpretation also adopted in a declaration signed by Duane's attorney.

Duane's counsel submitted Newingham's written statement and other exhibits to the court on the day of the June 12, 2012, hearing. Newingham's written statement was labeled "Exhibit 1." At that hearing, the court expressed reluctance to consider it. However, nine days later at the hearing where the court announced its decision, the court responded to a point raised by Duane's counsel by stating: "I considered the exhibits you filed. Even though they were filed late, I took that into consideration." Because Newingham's statement was one of the exhibits submitted by Duane's attorney, we interpret the court's statement to mean that it did consider Newingham's statement.

We note that, in his November 1, 2012, declaration regarding omitted portions of the record, Duane's attorney adopted the same interpretation of the superior court's statements about Newingham's written statement. Specifically, Duane's attorney asserted that the judge "not only admitted them into evidence but considered them as well."[4] In this context, "them" refers to the late-submitted exhibits, which included Newingham's written statement.

Therefore, Duane's argument that the superior court committed reversible error by excluding Newingham's written statement from evidence fails for the simple reason that the court considered the statement and did not exclude it.

B. Transcript of 2004 Trial

Duane asserts that the superior court denied his motion to set aside the judgment from 2004 because he did not produce transcripts of the four days of trial conducted in 2004. Duane contends those transcripts were unnecessary because Sheila "already admitted that the issue of cohabitation had not been previously decided …." He argues

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[4] Stated more bluntly, about three months after Duane's attorney signed the declaration "under penalty of perjury under the laws of the State of California," that attorney contradicted his declaration by signing an opening appellant's brief that asserted "it appears that, the [superior court] excluded Mr. Newingham's, the cohabitant's declaration."

that the superior court abused its discretion by requiring more proof that the issue of cohabitation had not previously been decided—particularly when that additional proof "would have been unnecessarily burdensome to provide …."

We conclude that Duane's interpretation of the superior court's reasoning concerning the 2004 judgment is unduly narrow and, thus, inaccurate. The superior court orally set forth its ruling on Duane's motion to set aside at the June 21, 2012, hearing. As to the 2004 judgment, which became final when remittitur was issued by the clerk of this court in August 2006, the court stated:

> "In that [Duane] has failed to meet his burden of proof to provide any evidence the 2004 judgment was procured by fraud or perjury, the motion to set aside any of that judgment is denied. No transcript of the proceedings related to the 2004 judgment were provided to the Court or filed with the Court, nor was any evidence presented to indicate that [Duane] would have been disadvantaged in any way by the testimony that's been presented in the exhibits provided last time at the hearing."

The court's reference to the lack of evidence that Duane was "disadvantaged" relates to the conditions set forth in subdivision (b) of section 2121:

> "In all proceedings under this chapter, before granting relief, the court shall find that the facts alleged as the grounds for relief materially affected the original outcome *and* that the moving party would materially benefit from the granting of the relief." (Italics added.)

Thus, the superior court's decision regarding the 2004 judgment had two independent bases. First, the court found Duane did not prove the judgment was procured by fraud or perjury. Second, the court determined Duane did not establish that the alleged fraud and perjury materially affected the terms of the 2004 judgment. In this appeal, Duane cannot show reversible error unless he establishes that both of the determinations were wrong.

Duane's argument about the transcript from the 2004 trial does not establish the superior court erred in both of its determinations. Even if we accepted Duane's position that the issue of cohabitation was not decided in 2004 and, therefore, Duane was not

barred by the finality of that judgment from raising the issue in a motion to set aside the judgment, that position alone does not establish reversible error. Duane still must show that (1) Sheila committed fraud or perjury before the 2004 judgment was entered and (2) that Duane was disadvantaged by that fraud or perjury.

In view of the conflicting evidence in the record regarding when Sheila began cohabiting with Newingham, we cannot presume it began before the October 2004 judgment was entered. (See fn. 3, *ante*.) Instead, we must presume that the cohabitation occurred after that judgment was entered and, therefore, could not have influenced that judgment's requirement for spousal support.

In short, Duane's argument regarding the transcript falls far short of establishing all of the elements of reversible error.

C. Nondisclosure of Cohabitation from Separation to Final Judgment

Duane asserts that the superior court erred in denying his motion to set aside the 2004 judgment because (1) from separation to final judgment (September 6, 2002 through August 23, 2006) Sheila had a fiduciary duty to disclose[5] that she was cohabitating and (2) from March 2003 through final judgment, she failed to disclose that she was cohabitating with Newingham. Our analysis of this argument will divide the period into two parts—the first is the period the matter was pending in superior court and the second is the period during the appeal.

1. Separation to Entry of Judgment (September 2002 – October 2004)

Duane cannot prevail on his argument that Sheila had a fiduciary duty to disclose her cohabitation with Newingham *before* the October 2004 judgment was entered. First,

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5 Under subdivision (f) of section 2122, the failure to comply with statutory disclosure requirements is a ground for a motion to set aside a judgment. Sections 2104 and 2105 provide that parties to a proceeding for dissolution of a marriage shall serve the other party with preliminary and final declarations of disclosure.

the superior court did not make an express finding that Sheila cohabitated with Newingham during this period.

Second, as stated earlier, the doctrine of implied findings requires this court to infer that Sheila and Newingham did not cohabitate prior to October 2004. (See pt. II.B, fn. 3, *ante*.) This implied finding is required because it is favorable to the superior court's decision and it is supported by substantial evidence. (See *People ex rel. Dept. of Corporations v. SpeeDee Oil Change Systems, Inc.*, *supra*, 20 Cal.4th at p. 1143 [implied findings favorable to decision are made by appellate courts if supported by substantial evidence].) The substantial evidence includes Sheila's May 2012 declarations and her deposition and courtroom testimony. Her declaration states that she did not cohabitate with another man during the pendency of the dissolution proceeding. Her deposition testimony indicates that she lived with Newingham in 2006 through sometime in 2008. This evidence supports an implied finding that Sheila did not cohabitate with Newingham prior to October 2004, even though Newingham's written statement provides a conflicting version of events. It is well established that the testimony of a single witness, even a party in an action for the dissolution of marriage, constitutes substantial evidence. (*In re Marriage of Mix* (1975) 14 Cal.3d 604, 614.)

2. Entry of Judgment to Remittitur (October 2004 – August 2006)

Duane's argument regarding the nondisclosure of cohabitation includes the period during which his appeal of the October 2004 judgment was pending before this court. His position regarding this period has both factual and legal flaws.

As to the facts, Sheila admitted that she cohabitated with Newingham in 2006, 2007 and 2008, but the portions of her testimony that are included in the appellate record do not indicate when in 2006 the cohabitation (as opposed to the relationship itself) began. Given this state of the record, Duane has not established that Sheila and Newingham were cohabitating prior to the remittitur in August 2006.

As to the legal basis for his position, Duane has cited no authority for the proposition that a litigant in a marriage dissolution proceeding has an affirmative duty to disclose any cohabitation *that begins during the pendency of an appeal*. Section 2100 sets forth the Legislature's findings and declarations of public policy regarding the disclosure of assets and liabilities during a proceeding for the dissolution of marriage. Subdivision (c) of section 2100 states that "each party has a continuing duty to immediately, fully, and accurately update and augment that disclosure to the extent there have been any material changes so that … at the time of trial on these issues, each party will have full and complete knowledge of the relevant underlying facts." Duane's arguments do not address why this statutory duty of continuing disclosure, which by its terms operates until the time of trial, should be extended to include postjudgment periods. Given the lack of authority and reasoned argument on this point, we will not adopt the novel legal proposition that an affirmative duty to disclose applies to cohabitation that begins during the pendency of an appeal.

Therefore, we conclude that the superior court did not commit legal or factual error when it rejected Duane's arguments regarding the nondisclosure of cohabitation that allegedly occurred between separation and remittitur.

D. Claims of Error Regarding Refusal to Set Aside May 26, 2009, Judgment

In February 2009, Duane filed an order to show cause seeking a modification of his monthly obligation to pay $1,000 in spousal support. On May 26, 2009, the superior court denied this request. On appeal, Duane argues that the superior court's denial is erroneous on two separate grounds.

First, Duane contends that Sheila failed to disclose that she was cohabitating with Newingham and, because cohabitation creates a rebuttable presumption of reduced need, this failure to disclose materially affected the outcome of his request for a modification. Second, Duane contends that Sheila failed to disclose that she had substantial income and

substantial assets and his proof of her failure to disclose assets, alone, was sufficient to show the outcome of his motion was materially affected.

1. Cohabitation and Presumption of Reduced Need

Section 4323, subdivision (a)(1) provides that "there is a rebuttable presumption, affecting the burden of proof, of decreased need for spousal support if the supported party is cohabiting with a person of the opposite sex." The verb phrase "is cohabiting" is in the present tense. Consequently, one practice guide has restated the provision in section 4323 as follows: "An obligor seeking a spousal support reduction or termination need simply show the obligee is *now* 'cohabiting with a person of the opposite sex.'" (Hogoboom, et al., Cal. Practice Guide: Family Law (2013) Modifications of Orders and Judgments, ¶ 17:205, italics added.)

The evidence presented by Duane does not establish that Sheila's cohabitation with Newingham extended into 2009, much less was continuing when she filed her declaration of income and expenses in April 2009 before the hearing on Duane's order to show cause. Indeed, viewing the evidence in the light most favorable to the judgment, we must conclude that the cohabitation ended in October 2008.[6] (See fn. 3, *ante*.) Therefore, based on the explicit terms of the statute that govern the application of the presumption of reduced need it is clear that the presumption does not apply to the circumstances of this case that existed in April and May of 2009 when the superior court considered and decided Duane's request for modification of spousal support. Furthermore, Duane has presented no case law or policy arguments that justify a nonliteral interpretation of the presumption of reduced need.

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6 Duane does not contend that the cohabitation extended beyond the end of 2008. His opening brief argues that, on April 23, 2009, in response to his motion to modify spousal support, "[Sheila] (effectively) declared that she had not been cohabitating with anyone; when, in fact, from April through December 2008, she had been."

Therefore, we conclude that Duane has not shown that the trial court committed reversible error when it refused to set aside the May 26, 2009, order based on Sheila's failure to disclose prior cohabitation.

2. Failure to Disclose Income and Assets

Duane contends that on April 23, 2009, in response to his motion to modify spousal support, Sheila "declared that she had no income and limited assets; when, in fact, she had substantial income and substantial assets." In Duane's view, the superior court found that Sheila had failed to disclose substantial assets, but also found that the assets and her bed-and-breakfast business were immaterial to setting aside the prior judgments and orders because Sheila claimed she derived no income from them. Again, Duane has not accurately described the superior court's findings. The court did not find a failure to disclose substantial assets.

The superior court addressed Duane's motion to set aside the May 26, 2009, ruling that denied any modification to his spousal support obligations by stating that ruling was based on the finding that Sheila's business venture was not producing any income at that time. The superior court also noted the materiality requirements in subdivision (b) of section 2121 and stated:

> "Here, the Court is presented with the conclusionary statements of [Duane] that there would have been a different result. Even assuming that [Sheila] was not truthful in her April 8th, 2009, testimony as claimed by [Duane], the Court cannot find that there would have been a materially different result based upon review of Judge Dulcich's order."

Duane has failed to show that the foregoing reasoning by the superior court contains error. First, Duane has not shown that Sheila did, in fact, have a substantial income that she failed to disclose. Her income and expense declaration dated April 1, 2009, stated that she had no income from salary, wages or investment income, but in item 8 of the preprinted form she stated she received additional income in the last 12 months in the amount of $218,000 from the enforcement of a judgment against Duane and a

$39,000 inheritance from her mother. Duane's citations to the record utterly fail to establish Sheila had *income* not disclosed in her declaration, her March 2009 deposition testimony, or her April 2009 courtroom testimony.

Second, Duane's position that Sheila had substantial undisclosed *asset*s is based on his assertion that "the Honorable Stephen Schuett found that [Sheila] had failed to disclose substantial assets, including; the money she gambled away, $73,000; the money she used to restore a 185 foot boat, *The America*, substantially more than $129,000; the money she used to buy the *The America*, $75,000; a bed and breakfast business in addition to the one she conducts on *The America*; and, several other boats

As the basis for his position that the superior court made the foregoing finding of substantial undisclosed assets, Duane cites lines four through eight of page 13 of the reporter's transcript, which lines constitute the first half of the following quote:

> "Secondly, the payment for work on The America – that is another issue that was raised in the moving papers – nothing in the record indicates that this would have altered the Court's ruling. The order was based on a lack of income from that business. Finally, there was a question on who actually worked on the boat, The America. Again, nothing presented by [Duane] would indicate how that would have materially altered the Court's ruling. Therefore, the motion is denied."

In view of these statements by the superior court, we cannot accept Duane's interpretation that the court found Sheila failed to disclose substantial assets. Consequently, we reject Duane's argument that the superior court committed reversible error in denying his request to set aside the May 26, 2009, order that refused to modify his spousal support obligation. As an alternate and separate ground for our conclusion, Duane also has failed to establish the superior court's finding regarding materiality was error.

E. Standing to Challenge Spousal Support While Charged with Contempt

Duane argues that he was entitled to bring his motion to set aside the previous orders and judgments regarding spousal support even though there was a pending order to

show cause regarding his allegedly chronic failure to make the ordered spousal support payments. (See generally, *In re Marriage of Hofer* (2012) 208 Cal.App.4th 454, 458-460 [husband's appeal dismissed under disentitlement doctrine].) We need not address this argument because we have not relied on the pending contempt proceedings as a ground for upholding the superior court's denial of his motion to set aside.

DISPOSITION

The June 21, 2012, order that denied petitioner's motion to set aside is affirmed. Respondent shall recover her costs on appeal.